ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	CC Docket No. 91-142
	)	
ALABAMA WIRELESS, INC., formerly	)	
ALGREG CELLULAR ENGINEERING	)	File No. 10607-CL-P-307-A-89
	)	
et al.	)	et al.
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Various Rural Service Areas	)	

RECEIVED
JUL 22 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

JOINT MOTION TO STRIKE SO-CALLED "STATEMENT FOR THE RECORD"

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SUMMARY

The so-called "Statement for the Record" ("Statement") filed by the law firm of Bechtel & Cole, Chartered on behalf of several entities (collectively, the "Turnpike Group") must be stricken in its entirety. No member of the Turnpike Group is now nor ever has been a party to this proceeding. The Turnpike Group has never filed a motion to intervene nor made any of the required showings associated with such a motion, including any showing as to why it was not possible for it to have participated in this proceeding from the time the matter was designated for hearing seven years ago, nor could any of them make such a showing if it tried to do so.

First and foremost, the participation of the Turnpike Group entities has been definitively foreclosed by the Court of Appeals' decision in *Turnpike Cellular Partners v. FCC*, Case No. 97-1421, *per curiam*, December 16, 1997, which ruled that they cannot participate in this case. In addition, the Turnpike Group has missed the statutory deadline for intervention set forth in Section 309(e) of the Communications Act of 1934, as amended (the "Act"). Moreover, to the extent that the "Statement" is in essence a petition for reconsideration of a Commission decision that was publicly issued more than one year ago, it is in violation of the statutory deadline for petitions for reconsideration set forth in Section 405(a) of the Act. Thus, Sections 309(e) and 405(a) of the Act each stand as an independent and absolute barrier to the Turnpike Group's to participation.

If this Commission allows new persons to intervene without good cause at every juncture of this proceeding, and thereby create the impossible situation of a case without end, the Commission will establish a disastrous precedent. If this Commission allows the Turnpike Group to participate in this case, then Section 309(e) and 405(a) of the Act are *de facto* repealed, and Sections 1.106(b)(1) and 1.223(c) of the Rules are erased. The public interest cannot support such a result. The Commission must summarily strike the Turnpike Group entities' "Statement", and preclude their participation in this case.

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ALABAMA WIRELESS, INC., formerly	)
ALGREG CELLULAR ENGINEERING	) File No. 10607-CL-P-307-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 307, Alabama 1- Franklin	)
	)
CRANFORD CELLULAR COMMUNICATIONS	) File No. 10611-CL-P-311-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 311, Alabama 5- Cleburne	)
	)
BAY CELLULAR OF FLORIDA	) File No. 10754-CL-P-497-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 497, Mississippi 5-	)
Washington	)
	)
FLORIDA CELLULAR	) File No. 10445-CL-P-505-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
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	)
A-1 CELLULAR COMMUNICATIONS	) File No. 10454-CL-P-514-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 514, Missouri 11- Monteau	)
	)
BRAVO CELLULAR, LLC, formerly	)
BRAVO CELLULAR	) File No. 10673-CL-P-579-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 579,	)
North Carolina 15-Cabarrus	)
	)
OHIO WIRELESS, LLC, formerly	)
ALPHA CELLULAR	) File No. 10909-CL-P-586-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 586, Ohio 2, Sandusky	)

CEL-TEL COMMUNICATIONS OF OHIO, LLC, formerly CEL-TEL COMMUNICATIONS	)	File No. 10912-CL-P-589-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5- Hancock	)	
EJM CELLULAR PARTNERS	)	File No. 10567-CL-P-596-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1-Cimarron	)	
PINELLAS COMMUNICATIONS	)	File No. 10808-CL-P-613-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2- McKean	)	
CENTAUR PARTNERSHIP	)	File No. 10720-CL-P-631-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7- Calhoun	)	
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For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8- Hampton	)	
A-1 CELLULAR COMMUNICATIONS	)	File No. 10409-CL-P-661-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10- Navarro	)	
EJM CELLULAR PARTNERS	)	File No. 10116-CL-P-721-A-89
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4- Niobrara	)	
JAYBAR COMMUNICATIONS	)	File No. 10042-CL-P-323-A-88
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6-Graham, for Station KNKN251	)	

DATA CELLULAR SYSTEMS	) File No. 10029-CL-P-345-A-88
	)
For facilities in the Domestic Public Cellular Tele-communications Radio Service on Frequency Block A, in Market 345, California 10-Sierra, for Station KNKN250	)
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	)
NORTH AMERICAN CELLULAR	) File No. 10066-CL-P-388-A-88
	)
For facilities in the Domestic Public Telecommun-ications Radio Service on Frequency Block A, in Market 388, Idaho 1-Boundary, for Station KNKN253	)

To: The Commission

JOINT MOTION TO STRIKE SO-CALLED "STATEMENT FOR THE RECORD"

Alabama Wireless, Inc.,formerly Algreg Cellular Engineering ("Algreg"), Cranford Cellular Communications ("Cranford"), Bay Cellular of Florida ("Bay"), Florida Cellular, ("Florida"), A-1 Cellular Communications (A-1), Bravo Cellular, LLC, formerly Bravo Cellular ("Bravo"), Cel-Tel Communications of Ohio, Ltd., formerly Cel-Tel Communications ("Cel-Tel"), EJM Cellular Partners ("EJM"), Pinellas Communications ("Pinellas"), Centaur Partnership ("Centaur"), Ohio Wireless, LLC, formerly Alpha Cellular ("Alpha"), South Carolina Cellular Corporation, formerly Signal Cellular Communications ("Signal"), Jaybar Communications ("Jaybar"), Data Cellular Systems ("Data"), Cellular Pacific ("CP"), and North American Cellular ("North American") (collectively, "Licensees"), by their attorneys and pursuant to Section 1.41 of the Commission's Rules, hereby submit their Joint Motion to Strike the so-called "Statement for the Record" ("Statement") filed on

or about June 26, 1998 by the law firm of Bechtel & Cole, Chartered, on behalf of several entities which are not now and never have been parties to this case[1] (collectively, the "Turnpike Group"). The Turnpike Group entities seek to establish, without filing any motion for leave to intervene or making any of the required showings associated with such a motion, that they have obtained, perhaps through osmosis or alchemy, the status of parties to this case.[2]

As discussed below, as non-parties, even had they done so back on July 3, 1997, the Turnpike Group would have had no right to file a petition for reconsideration, unless they had filed a concurrent motion for leave to intervene out of time and somehow established therein a compelling reason for each individual entity to be allowed to intervene as a new party years after the statutory deadline. Indeed, the Court of Appeals, acting upon a motion to dismiss that was strongly supported by this Commission, already has ruled that the Turnpike Group is precluded from participating in this case as a party, and that ruling is binding here. Finally, as discussed below, there is no policy reason

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[1]There are a number of decisions that have been issued in this proceeding, that is, CC Docket No. 91-142, all of them without the participation of the Turnpike Group entities. The most recent is *Algreg Cellular Engineering*, 12 FCC Rcd. 8148 (rel. June 3, 1997), hereafter, "*Algreg V*". The original designation order herein, 6 FCC Rcd. 2921 (Common Carrier Bureau, 1991), is "*Algreg I*", the initial decision herein, 7 FCC Rcd. 8686 (ALJ, 1992), is *"Algreg II,"* and the two Review Board decisions herein, 9 FCC Rcd. 5098 (1994), recon. denied 9 FCC Rcd. 6753 (1994), are "*Algreg III*" and "*Algreg IV*", respectively.

[2]Insofar as the "Show Cause" portion of CC Docket No. 91-142 is concerned, the Turnpike Group's attempt to participate is frivolous in the extreme. Even the timely July, 1991 petition for intervention filed by ZDT Partnership in this proceeding was granted by the Commission only with respect to the "tentative selectee" markets, and not with respect to the revocation portion of the proceeding. *See Algreg Cellular Engineering, Memorandum Opinion & Order*, FCC 91R-78, released September 10, 1991. Even the so-called "Bell Boyd & Lloyd" non-party entities that filed a petition for reconsideration on July 3, 1997 expressly noted to the Commission therein (footnote 2) ". . .that the Petition [for Reconsideration] did not seek review of any action regarding markets which were the subject of revocation proceedings."

As the Turnpike Group entities are not parties to this proceeding, they are not entitled to be added to the service list except as to a document that disposes of the "Statement."

for this Commission to allow the Turnpike Group to intervene seven years late, and there are compelling policy reasons for this Commission to preclude such intervention. In this Motion, the Licensees will demonstrate that the public interest, especially the public interest in administrative and judicial economy, requires that the Commission promptly strike the "Statement."[3]

BACKGROUND

The captioned applications were filed during filing windows established by the Commission in 1988. Each of the Licensees was chosen as "tentative selectee" by the Commission pursuant to the random selection process, and each voluntarily notified the Commission by post-lottery amendment (pre-lottery amendments being absolutely prohibited, even for §1.65 purposes) that it was a signatory to a reciprocal contract (later referred to by the Commission as the "MCRSA"). The Commission put out a public notice respecting the filing of these amendments, identifying the signatories and prohibiting *ex parte* presentations concerning them. *See* Public Notice, Report No. CL-90-74, released January 4, 1990.

The Commission also put out several public notices naming the various Licensees as tentative selectees, thereby triggering the petition-to-deny process of Section 309(d) of the Communications Act of 1934 as amended ("Act"), 47 U.S.C. §309(d), and former Section 1.823(b) of the Commission's Rules (which governed petitions to deny against RSA cellular random selection

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[3]There is ample reason for the Commission to investigate: (1) the circumstances surrounding the preparation and filing of the "Statement"; (2) the motives for the pleading; (3) the fee arrangement; and, most importantly, (4) the qualifications of the Turnpike Group to hold FCC licenses. However, that investigation should be conducted as a separate proceeding before an administrative law judge, rather than in the context of this licensing proceeding. *See K.O. Communications*, DA 98-1342 (WTB, rel. July 7, 1998) at ¶31 (where current record is insufficient to determine whether petitioner committed abuse of process, proper course is to immediately deny the petition and to consider the abuse of process issues in a separate proceeding).

tentative selectees). Although former Section 1.823(b) provided for an extra-long period of forty-five days for the filing of petitions to deny (as opposed to the thirty days that the Commission usually affords), and although petitions to deny were filed by other persons similarly situated to members of the Turnpike Group, none of the entities in the Turnpike Group filed a petition to deny.[4]

By Public Notice, Report No. CL-90-92, released January 31, 1990, the Commission's Mobile Services Division initiated an investigation of the Licensees under MSD File No. 90-5, and invited interested persons to intervene within thirty days of that Public Notice, even if they had not previously filed a petition to deny.[5] Although other persons did timely intervene in response to that public notice, none of the members of the Turnpike Group did so.

The Mobile Services Division conducted its investigation for over a year. That investigation culminated in a decision to designate all of the Licensees' applications for hearing before an administrative law judge with full-blown discovery, which designation order, *Algreg I*, established a final 30-day window for interested persons to seek to intervene. In keeping with Section 309(e) of the Act, 47 U.S.C. § 309(e), the thirty days commenced running on June 21, 1991, the date that *Algreg I* was published in the *Federal Register*. Once again, although someone else timely intervened during that interval, the members of the Turnpike Group did not. Thereafter, the proceeding, CC

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[4]As indicated by the July 14, 1998 letter from counsel to the Petitioner parties (attached hereto as Exhibit A), they represent dozens of similarly-situated persons, but none of the entities constituting the Turnpike Group.

[5]Significantly, even then the Commission was aware of the potential for mischief and harm to its processes which would be engendered unless procedural deadlines were established and adhered to early on in this proceeding. The Commission stated: "In order to eliminate repetitious filings we are hereby establishing the following consolidated filing schedule and procedural deadlines." Thus, the Turnpike Group knew early on that if it desired to participate, it had to do so timely or miss publicly announced "procedural deadlines."

Docket No. 91-142, progressed as the most complex and cumbersome proceeding in the history of cellular licensing, with literally dozens of parties participating, tens of thousands of pages of discovery and depositions, forty days of hearings before the administrative law judge, more than 12,000 pages of transcript, an initial decision, a Review Board decision, a second Review Board decision on reconsideration, and finally, more than six years after the original designation order (almost eight years after the Licensees' voluntary filing of the MCRSA and almost nine years after the captioned applications were filed), the Commission released *Algreg V*.

Having sat back for all this time, through all these proceedings (including various decisions in *Algreg II, Algreg III and Algreg IV*), and without even filing a request for leave to intervene out of time, the Turnpike Group filed a Notice of Appeal with the U.S. Court of Appeals on July 3, 1997. The timing of Turnpike's court appeal followed precisely on the heels of the public announcement by the Commission on June 3, 1997, *Algreg V* at ¶¶89-94, that cash settlement payments to the petitioner parties in the case might be approved. Patently, the Turnpike Group attempted to enter the case to extract greenmail in return for withdrawal of their participation.

Not surprisingly, the Court of Appeals, which does not allow its processes to be abused, summarily dismissed the Turnpike Notice of Appeal, on the ground that the Turnpike Group entities were not parties to the case before the Commission. *Turnpike Cellular Partners v. FCC*, Case No. 97-1421 (*per curiam*, December 16, 1997) (copy attached hereto for convenience as Exhibit B) ("*Turnpike Decision*"). The Court denied rehearing and rehearing *en banc*, and the Turnpike Group did not file for Supreme Court review, so the *Turnpike Decision* is a final, unappealable judicial order. Now, in the "Statement," the Turnpike Group have announced, as if they and not this Commission are administering this proceeding, that they are now parties to this case. Commission rules require

that any person seeking leave to intervene as a party out of time supply a sworn declaration concerning not only its standing, but also the reason why it was "not possible" to have intervened sooner, *See* §1.106(b)(1). The Turnpike Group filed no sworn declaration whatsoever.

DISCUSSION

I. The *Turnpike Decision* Forecloses the Turnpike Group's Participation

The "Statement" at n.4, pretends that the *Turnpike Decision* somehow affords the Turnpike Group the opportunity to participate in this proceeding "to assure that [the Turnpike Group] will *retain* their ability to obtain substantive review. . ." (Emphasis added.) This pretension is frivolous. The Court held specifically that because the Turnpike Group were not parties to the case, "they are not entitled to judicial review." There is no "ability to obtain substantive review" for the Turnpike Group to "retain."

The *Turnpike Decision* is clear. If through the efforts of parties to the case, the Commission's order in *Algreg V* were overturned, the Turnpike Group will be able to compete for the then-vacant license allotments, the same as anybody else. In the meantime, the Turnpike Group must continue to do what they chose to do for the first six years of this proceeding -- sit back and watch. The *Turnpike Decision*, as the law of the case here, precludes any other result.

II. Sections 309 and 405 of the Act Precludes the Turnpike Group's Participation

The "Statement" is, in essence, an effort to claim the status of a party to the proceeding and the right, as a party, to prosecute a petition for reconsideration of *Algreg V*. Section 405(a) of the Communications Act of 1934 as amended ("Act"), 47 U.S.C. §405(a), expressly states that any petition for reconsideration of a Commission decision "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." This is a

statutory deadline, and only Congress has the power to change it. Because the Turnpike Group missed this statutory deadline by more than eleven months, it cannot be allowed to participate in this proceeding.

Section 309(e) of the Act constitutes a separate and independent prohibition to the Turnpike Group's participation here. That statute expressly provides that whenever, as in this proceeding, there are material questions of fact requiring designation for hearing, even persons who have standing are prohibited from participating in the proceeding unless they file "a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues in the Federal Register." Again, this is a statutory deadline, that the Turnpike Group missed by almost seven years.

III. The Turnpike "Statement" Must Be Stricken on Other Procedural Grounds

Our society has established procedures for judicial and administrative forums. These procedures are recognized as a positive good for society, because they hold out the prospect that eventually every case will come to an end, and the people involved can get on with their lives, whatever the outcome.

This fundamental rule in favor of timely participation and finality of resolution of disputes is a part of the American administrative process in general and the processes of this Commission in particular. Thus, Section 1.106(b)(1) of the Commission's Rules specifically prohibits the filing of a petition for reconsideration, even by a person with standing, unless that person either participated in the proceeding as a party before the decision for which reconsideration is sought, or that person shows "good reason why **it was not possible for him to participate in the earlier stages of the proceeding.**" (Emphasis added.) Section 1.223(c) contains the same wording respecting

intervention in cases designated for hearing. This is an extremely high hurdle. To intervene, each entity in the Turnpike Group must separately show how it overcomes that hurdle, but not one of them has made any effort whatsoever to do so.

Perhaps the best description of the societal disruption that would result if this Commission were to let the Turnpike Group participate is this Commission's own description, when the Commission was asking the *Turnpike* Court to summarily dismiss Turnpike's appeal:

> To find that appellants [*i.e.*, the Turnpike Group] have standing in this case would mean that "any one can wander in off the street, pronounce himself a potential contestant, and thereby recruit the courts to upset a decision of a coordinate branch of government." *Coalition for the Preservation of Hispanic B'casting v. FCC*, 893 F.2d 1349,1363 (DC Cir. 1990) (Williams, J., dissenting) (affirmed in part and vacated in part, 931 F.2d 73 *en banc*). The undesirability of such a result is particularly evident in this case where settlements among the parties to the proceeding with respect to some of the markets at issue had been reached before appellants filed their appeals. Settlements require the agreement of all parties to a proceeding. Such agreements will not likely occur if they may be upset by a "johnny-come-lately" who, after "lollygagging around the track while others strove," [footnote omitted] suddenly discovers an interest in the proceeding . . .

Comments in Support of Motions to Dismiss, pp.15-16, filed by the FCC in Case No.97-1421 on September 23, 1997.

Sixty (60) years ago, the U.S. Court of Appeals for the D.C. Circuit explained why the predecessor of current Section 1.106(b)(1) serves a vital purpose. In *Red River B'Casting Co. v. FCC*, 98 F.2d 282, 286-7 (D.C. Cir. 1938) (*"Red River"*), the Court observed:

> Such a person should not be entitled to sit back and wait until all interested persons who do act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation ... [S]uch

> a procedure would permit successive appeals by many persons and as a result a complete blocking of administrative action.

(Emphasis added.) This is exactly Turnpike Group's tactic -- "successive appeals by many persons and as a result a complete blocking of administrative action."

From *Red River* to the present, the D.C. Circuit has consistently upheld the Commission in rejecting opportunistic latecomers from participating in licensing proceedings at very late stages. Thus, for example, acting *en banc* by an 11-to-1 vote, the Court explained:

> The exhaustion requirement protects the FCC's interest in the finality of its adjudication and, as in this case, settlements arising under its jurisdiction. Requiring applicants for . . . licenses to file on time also permits the Commission to take an advance reading of the various claims and order its business efficiently from the beginning.

Coalition for the Preservation of Hispanic B'casting v. FCC, 931 F.2d 73, 77 (1991) ("*Coalition*").

In *Coalition*, two broadcast licensees filed for station renewals, and no competing applications were filed by the deadline. However, rather than grant the renewals, the Commission designated the renewal applications for hearing. Although they could have intervened in that hearing, two outside entities, Hispanic Broadcasting Systems, Inc. and Hispanic Broadcasting Limited Partnership (the "Latecomers") did not do so. Rather, the Latecomers sat back and waited for the hearing to run its course. When the Review Board granted renewal on a conditional basis, the Latecomers attempted to late-file competing applications and to seek review of the Review Board decision. The Commission denied the Latecomers party status, but allowed them to participate as *amici*. The Commission affirmed the Review Board.

On judicial review, the Court held that although the Latecomers may well have had standing, they had no right to seek substantive review, whether or not they had standing. The Court stated, 931 F.2d at 76:

> The judicial review provision of the Communications Act, 47 U.S.C. §402(b), authorizes ... "any ... person who is aggrieved or whose interests are adversely affected" by a Commission licensing order to sue for relief in this court. Yet even "aggrieved" persons must comply with prescribed administrative procedures. [Citations omitted.]

Among the cases relied upon by the *Coalition* court (*see* 931 F.2d at 77) was *Spanish Int'l. B'casting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967) ("*Spanish International*"). In that case, Panorama applied for a television license to broadcast from Mt. Wilson, near Los Angeles, proposing a Spanish-language format. Eight months after the deadline for petitions to deny, Spanish International, an existing Los Angeles television station with a Spanish-language format, filed a petition to deny against Panorama. The Commission denied leave for the filing of the late-filed pleading, but designated the Panorama application for hearing on its own motion. The Commission did not name Spanish International as a party to the hearing, but did not bar it from moving to intervene and participate, if it established standing (an issue the Commission did not address). Spanish International did not seek to intervene as a party to the hearing; rather, it sat back and let the hearing take its course. After the initial decision was issued in favor of Panorama, Spanish International filed a motion for leave to intervene so that it could seek review of the initial decision. The Commission denied Spanish International's intervention.[6]

On review, the Court held, 385 F.2d at 622:

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[6]See *International Panorama TV, Inc.*, 2 FCC 2d 637 (Review Board, 1966) ("*Panorama*").

> [T]he Commission was well within its authority in finding appellant's tardiness inexcusable and that its failure to utilize available administrative remedies to seek admission as a participant bars judicial relief.

The *Spanish International* court did not, however, leave it at that. The Court implied that the Commission would have erred had it reached any other result, stating, *id.* at 622:

> We have had occasion to observe that "Congress clearly recognized that sound regulation has procedural as well as substantive elements, and that 'the public interest, convenience, and necessity' comprehends both. Orderliness, expedition, and finality in the adjudicating process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own." [Footnote omitted.]

Patently, if there was ever a case where the public interest in the "procedural elements" of "sound regulation" required the rejection of a tardy attempt at intervention, this is that case. As noted, here the *Algreg I* order was released over seven years ago, and was itself the third Commission invitation to intervene in an even older proceeding. The Turnpike Group sat back and waited while others developed a discovery record, as well as over twelve thousand pages of hearing transcripts and documentary and other (*e.g.*, tape recordings, pictures) tangible evidence were presented to the Commission without the Turnpike Group's participation. It would be an abuse of discretion to allow the Turnpike Group to intervene at this point.

There is also considerable Commission precedent requiring that these "opportunistic latecomers," as past Commission precedent describes persons like them, be denied intervention and their tardy "Statement" ignored. *See, e.g., Raveesh K. Kumra,* 6 FCC Rcd. 4837 (Review Board, 1991) ("*Kumra*"); *Davidson County B'casting, Inc.*, 8 FCC Rcd. 1689, 1690 (1993); *RKO General, Inc. (KHJ-TV)*, 94 FCC 2d 879, 54 R.R.2d 53, 59 (1983); *Bronco B'casting Co.*, 50 FCC 2d 529,

533-4 (1974); *Howard University*, 23 FCC 2d 714, 716 (1970); *Louisiana Television B'casting Corp.*, 17 FCC 2d 973, 974 (1969); *Panorama, supra.*

The *Kumra* case is particularly on point, as it involves a hearing respecting an RSA cellular random selection tentative selectee from among the 1988 applications, just like the captioned cases. The Review Board there denied a person's request to intervene out of time, holding it to be a "dilatory request, filed more than sixteen months after the deadline set by Congress in 47 U.S.C. §309(e)." *Id.* To protect the integrity of its processes, the Commission must summarily, expeditiously and unequivocally dismiss the "Statement," as the Review Board did to the latecomer in *Kumra.*

CONCLUSION

No member of the Turnpike Group is a party to this proceeding. None has made any showing, by sworn declaration or even by unsworn hearsay, as to why "it was not possible" for it to have participated in this proceeding from the time the matter was designated for hearing seven years ago, nor could any of them make such a showing if it tried to do so. In any event, the *Turnpike Decision* and Sections 309(e) and 405(a) of the Act each stand as an independent and absolute barrier to allowing the Turnpike Group to participate in this proceeding.

If this Commission allows new persons to intervene without good cause at every juncture of this proceeding, and thereby create the impossible situation of a case without end, the Commission will establish a disastrous precedent. If this Commission allows the Turnpike Group to participate in this case, then Section 309(e) and 405(a) of the Act are *de facto* repealed, and Sections 1.106(b)(1) and 1.223(c) of the Rules are erased. The public interest cannot support such a result. The

Commission must summarily strike the Turnpike Group entities' "Statement", and preclude their participation in this case.

Respectfully submitted,

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EXHIBIT A

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David J. Kaufman, Esquire
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Dear David:

This responds to your letter of July 13, 1998 in which you sought to confirm certain information pertaining to the petitioners who were named as interested parties in CC Docket No. 91-142 when the case was designated for hearing (the "Petitioners"). I understand that you are seeking verification in order to assure the accuracy of representations the applicants and licensees will be making to the Commission in connection with the so-called "Statement for the Record" that was filed on behalf of certain non-parties.

Based upon communications with counsel to all the Petitioners:

1. Collectively, the Petitioners, which include some applicants [1/] and some groups of applicants [2/], represent 57 separate entities with applications which are or were mutually-exclusive with some or all of the applications at issue in CC Docket No. 91-142.

1/ The applicant petitioners are Buckhead Cellular Communications Partnership, Miller Communications, Inc., Skywave Partners, Inc., Thomas Domencich, and ZDT Partnership.

2/ The group petitioners are the Committee for a Fair Lottery, Applicants Against Lottery Abuse and Cellular Applicants' Coalition.

2. None of the Petitioners or their applicant members are parties to the "Statement for the Record" filed June 26, 1998 in the proceeding.

If you have any questions concerning this matter, please do not hesitate to call.

Very truly yours,

Carl W. Northrop
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

CWN:mah

cc: Donald J. Evans, Esq.
Barry Gottfried, Esq.
James F. Ireland, Esq.
Richard S. Myers, Esq.
William Zimsky, Esq.

WDC91397.1

EXHIBIT B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1421 **September Term, 1997**

Turnpike Cellular Partners,
Appellant

v.

Federal Communications Commission,
Appellee

Alpha Cellular, et al.,
Intervenors

Consolidated with 97-1423

BEFORE: Ginsburg, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of the motion to hold in abeyance, the motions to dismiss and the joint opposition thereto, the motion to strike, and the motion to supplement and the response thereto, it is

ORDERED that the motion to strike the amended joint response be denied. It is

FURTHER ORDERED that the motions to dismiss be granted. Because appellants failed to file a petition for reconsideration before the FCC and were not parties to the administrative proceedings during which the validity of the construction permits and licenses at issue here were challenged before the FCC, they are not entitled to judicial review. See 47 U.S.C. § 405(a); Spanish International Broadcasting Co. v. FCC, 385 F.2d 615, 624-28 (D.C. Cir. 1967). Appellants' arguments that it would have been futile to exhaust their administrative remedies are unpersuasive. See University of District of Columbia Chairs Chapter v. Board of Trustees of University of District of Columbia, 56 F.3d 1469, 1475 (D.C. Cir. 1995). In any event, the parties and the FCC agree that should the Commission's order be overturned, either after the Commission rules on the petition for reconsideration, or through judicial review, the appellants and intervenors on behalf of the FCC will be able to compete for the disputed licenses and permits. It is

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No. 97-1421 **September Term, 1997**

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot. It is

FURTHER ORDERED that the motion to supplement be granted. The Clerk is directed to file the lodged document.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

CERTIFICATE OF SERVICE

I, Denise L. Malloy, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing **"JOINT MOTION TO STRIKE SO-CALLED STATEMENT FOR THE RECORD"** to be sent via hand delivery, or first class U.S. mail this 22nd day of July, 1998, to each of the following:

***William F. Kennard, Chairman**
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, DC 20054

***Commissioner Michael K. Powell**
Federal Communications Commission
1919 M Street, N.W. - Room 802
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***Commissioner Harold Furchtgott-Roth**
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***Commissioner Gloria Tristani**
Federal Communications Commission
1919 M Street, N.W. - Room 826
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***Commissioner Susan Ness**
Federal Communications Commission
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Denise L. Malloy

Via hand delivery.